UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

May 10, 1999

Zelleka Getahun, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	OCAHO Case No. 94B00187
DuPont Pharmaceuticals Company, Respondent.	)	

ORDER ENTERING SUMMARY DECISION IN FAVOR OF COMPLAINANT

On March 17, 1994, Dr. Zelleka Getahun (complainant/Dr. Getahun) filed a charge with the Office of Special Counsel (OSC) alleging that her former employer, DuPont Pharmaceuticals Company (respondent/DuPont), violated the pertinent provisions of the Immigration Reform and Control Act (IRCA), as amended, by having discriminated against her by terminating her employment on the basis of her national origin and citizenship status, as well as having committed document abuse.

Specifically, Dr. Getahun, an Ethiopian national to whom political asylum had been granted on October 25, 1991, charged that her employment as a Senior Research Chemist with DuPont was terminated on October 27, 1993 based upon her national origin and citizenship status. She also alleged that DuPont committed document abuse by having demanded a specific Immigration and Naturalization Service (INS) document, a permanent residence application, in order to reverify her employment authorization, as well as having improperly rejected a proffered receipt for an Employment Authorization Document (EAD) application.

On July 25, 1994, the OSC sent a determination letter to Dr. Getahun through her attorney of record informing her that OSC would not file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on her behalf. OSC made this determination on the basis that, although she was entitled to a work authorization document incident to her status as a political asylee, her failure to apply for the document placed DuPont in a position in which terminating her employment was technically not a violation of the provisions of IRCA.

Resultingly, Dr. Getahun initiated a private action by having filed a Complaint with OCAHO on October 24, 1994 alleging discrimination on the basis of national origin and citizenship status, as well as document abuse. The relief sought by Dr. Getahun consisted of an award of back pay from October 27, 1993, being restored to her former position by DuPont and

also that DuPont issue a written statement acknowledging that its actions were "wrong and not within ordinary business practices."

DuPont filed an Answer on November 22, 1994. In March and April of 1995, both parties filed cross motions for summary decision. Dr. Getahun affirmatively withdrew her citizenship status and national origin discrimination claims and proceeded solely upon her document abuse claim. On July 24, 1996, the undersigned issued an Order Granting Respondent's Motion for Summary Decision, finding that upon the expiration of her EAD, Dr. Getahun was no longer authorized to work in the United States and therefore was not entitled to the document abuse protections afforded work-authorized aliens under IRCA. Dr. Getahun appealed that ruling.

In a decision dated September 15, 1997, the United States Court of Appeals, Third Circuit, reversed the ruling and remanded the case to OCAHO for reconsideration of Dr. Getahun's Motion for Summary Decision. Getahun v. OCAHO, 124 F.3d 591 (3rd Cir.1997). The court of appeals ruled that Dr. Getahun was authorized for employment based on her status as an asylee pursuant to 8 C.F.R. § 208.20, as it was written in 1991, which stated that employment authorization was automatically granted for asylees. 124 F.3d at 595. The court also found that because Dr. Getahun had automatically been granted employment authorization, DuPont was required to have accepted the EAD application receipt presented by Dr. Getahun at the time of reverification. Id.

On February 11, 1998, DuPont filed a Renewed Motion for Summary Decision. Dr. Getahun filed a Memorandum of Points and Authorities in Opposition to Respondent's Renewed Motion for Summary Decision on March 13, 1998.

On July 2, 1998, two orders were issued by the undersigned denying both parties' motions for summary decision. At that time two questions remained at issue: 1) whether DuPont specifically requested a receipt for a permanent residence application; and 2) whether Dr. Getahun tendered an EAD application receipt, and if so, whether DuPont rejected the document for reverification purposes.

A hearing scheduled to have been conducted in October 1998 was canceled at DuPont's request because the INS wished to file an Amicus Curiae Brief. That brief was filed by INS on October 15, 1998.

DuPont then filed a Motion for Reconsideration of its Renewed Motion for Summary Decision on December 15, 1998. Dr. Getahun filed a memorandum in opposition to DuPont's motion on January 29, 1999.

On April 13, 1999, DuPont filed a Request for Leave to Reply to Complainant's Opposition to Respondent's Motion for Reconsideration of its Renewed Motion for Summary Decision. DuPont's reply brief was included with the request.

On April 26, 1999, Dr. Getahun filed a letter objecting to DuPont's request for leave to reply to her opposing brief.

Standards of Decision

The OCAHO Rules of Practice and Procedure allow a party to motion for summary decision and any other party to respond within 10 days. 64 Fed. Reg. 7066, 7078 (1999) (to be codified at 28 C.F.R. § 68.38).[1] The rules do not specifically address motions for reconsideration, although section 68.11 addresses motions in general. That rule provides that responses to motions may be filed within 10 days after service of the motion and that "no reply to a response, counter-response to a reply, or any further responsive document shall be filed" unless allowed by the administrative law judge (ALJ). 28 C.F.R. § 68.11(b) (1998).

Section 68.38, which provides for summary decision, is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal court cases. Accordingly, case law interpreting Rule 56(c) is instructive in interpreting section 68.38 in these proceedings. Alvarez v. Interstate Highway Constr., 3 OCAHO 430, at 405 (1992).[2]

Summary decision is properly entered in favor of "**either party** if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed" indicate the absence of any genuine issue of material fact. 64 Fed. Reg. at 7078 (emphasis added).

The purpose of summary decision is that of avoiding an unnecessary hearing when there is no genuine issue of material fact. United States v. Zip City Partner, 7 OCAHO 965, at 714 (1997). The Supreme Court has stated that an issue is material only if it affects the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party has the initial burden of showing the absence of any genuine issue of

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[1] Portions of the Rules of Practice and Procedure for Administrative Hearings, codified at Part 68 of Title 28 of the Code of Federal Regulations, have been amended by the interim rule of February 12, 1999. Citation to the amended portions of Part 68 are to the interim rule published in the Federal Register, 64 Fed. Reg. 7066 (1999). Citation to the portions of Part 68 which were not affected by the interim rule are to the most recent volume of the Code of Federal Regulations, 28 C.F.R. Part 68 (1998).

[2] Citations to the Office of the Chief Administrative Hearing Officer (OCAHO) precedents reprinted in bound Volumes 1 to 7, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1 to 7 are to the specific pages, seriatim, of the specific entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); United States v. Marnul, 3 OCAHO 441, at 480 (1992). The non-moving party must then produce specific material facts which are genuinely at issue. Anderson, 477 U.S. at 250; Fakunmoju v. Claims Admin. Corp., 4 OCAHO 624, at 315 (1994). All facts and reasonable inferences drawn therefrom should be viewed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Discussion

Initially, we review DuPont's request for leave to reply to Dr. Getahun's response. The pertinent procedural rule provides that no reply to a response may be filed unless allowed by the ALJ. 28 C.F.R. § 68.11. In the voluminous history of this case, there have been numerous motions, briefs, replies and responses filed. Both parties have had more than ample opportunity to address the relevant issues before us. And taking into consideration the fact that DuPont has delayed requesting leave to respond for some three months after Dr. Getahun filed her response, that request to reply is hereby denied.

In support of its Motion for Reconsideration, DuPont maintains that there is no issue of material fact as to whether Dr. Getahun presented both an asylum order and an EAD application receipt for reverification purposes. Both parties clearly agree that she presented both documents. Instead, DuPont asserts that the only issue is that of determining whether it acted properly in refusing to accept those documents, and further that that issue is one of law which can and is being decided without a hearing.

Document abuse, as defined by IRCA in 1993, is "a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required . . . **or** refusing to honor documents tendered that on their face reasonably appear to be genuine . . . ." 8 U.S.C. § 1324b(a)(6) (1993) (emphasis added). There are three ways in which an employer can engage in document abuse: 1) requesting more or different documents than required by section 1324a(b); 2) insisting that the employee produce a specific document; and 3) refusing to honor a document which reasonably appears genuine. United States v. IBP, Inc., 7 OCAHO 949, at 454 (1997).

Prior to DuPont's motion for reconsideration, the only issues of fact remaining to be resolved at hearing were: 1) whether DuPont specifically requested a receipt for a permanent residence application; and 2) whether Dr. Getahun tendered an EAD application receipt, and if so, whether DuPont rejected the document for reverification purposes. In its supporting brief, however, DuPont acknowledges that Dr. Getahun presented an EAD application receipt. It argues that it properly refused the receipt, which is a question of law that should be decided without a hearing. DuPont further argues that the Third Circuit erred in its statements regarding the acceptability of the EAD application receipt. It cites as support the INS Amicus Curiae Brief in which the INS states that in 1993 the "receipt rule" did not extend to reverification. It also relies upon the language in the preamble to the interim rule published in the Federal Register in

1997 which amended the receipt rule. The preamble stated that the receipt rule "also extends that receipt rule to reverification." 62 Fed. Reg. 51,001, 51,004 (1997).

DuPont argues that this Office is not bound by the Third Circuit's statements under the "law of the case" doctrine because those statements constitute dicta and are not a part of the court's holding. Dr. Getahun, on the other hand, argues quite persuasively that this Office is bound by the "legal principles" decided by a federal appellate court.

The Third Circuit held that DuPont was required to have accepted the receipt in lieu of the EAD for which she had applied. The court also stated, "There are facts in the record which would support a finding that the refusal to accept the documents which Dr. Getahun presented constituted document abuse . . . . [h]owever, this is an issue which the OCAHO should address in the first instance." Getahun, 124 F.3d at 596.

The law of the case doctrine has been explained by the Supreme Court as "when a court decides a **rule of law**, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618 (1983) (emphasis added). The Court has also stated that, "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996).

The law of the case doctrine does not apply to dicta. In re City of Philadelphia Litigation, 158 F.3d 711, 718 (3rd Cir. 1998); see also Coca-Cola Bottling Co. v. The Coca-Cola Co., 988 F.2d 414, 430 (1993). The Third Circuit has adopted the definition of dicta as "statement[s] in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding–that, being peripheral, may not have received the full and careful [consideration] of the court that uttered [them]." Patel v. Sun Co., 141 F.3d 447, 462 (3rd Cir. 1998) (quoting Sarnoff v. American Home Prods. Corp., 798 F.2d 1075, 1084 (7th Cir. 1986)).

The issue before the appellate court was whether Dr. Getahun had standing as a work-authorized alien. Its statements regarding whether DuPont wrongly refused an EAD receipt were not related to the issue of standing. Those statements could have been deleted without affecting the analytical framework of the court's holding. Therefore, those statements are not binding. The Third Circuit's statements that this Office should address the issue in the first instance support the conclusion that it considered its statements to be non-binding dicta.

Further, in determining whether the receipt rule extends to the reverification process, the rule itself offers almost no assistance. It states, "If an individual is unable to provide the required document or documents within the time periods specified in paragraphs (b)(1)(ii) and (iv) of this section, the individual must present a receipt for the application of the replacement document or documents within three business days of the hire and present the required document or documents within 90 days of the hire." 8 C.F.R. § 274a.2(b)(vi) (1993). Sections (b)(1)(ii) and (iv), to which the receipt rule refers, address the time periods allowed for verification of

employment at the time of initial hire. The receipt rule does not refer to section 274a.2(b)(vii) which addresses reverification.

This omission, however, is not necessarily a deciding factor. OCAHO cases have historically extended protections granted to newly hired employees to those who are subject to the reverification process. For example, the reverification procedure is not expressly mentioned in the discrimination provisions of section 1324b. OCAHO case law has concluded, however, that employees are entitled to as much protection from discrimination in the reverification process as they receive at the time of their initial hire. See United States v. Louis Padnos Iron & Metal Co., 3 OCAHO 414, at 186 (1992); Mengarpuan v. Asbury Methodist Village, 4 OCAHO 612, at 240 (1994).

Finally, one OCAHO ruling specifically addressed the issue of whether the receipt rule applies to reverification. In Martinez v. Noah's New York Bagels, Inc., 6 OCAHO 917 (1997), the employee presented for reverification a receipt for a replacement alien registration card which was rejected by the employer. On the following day, the employee presented a Temporary Form I-551, which was also refused by the employer because the employer's self-imposed deadline had passed. In a brief discussion, the ALJ cited the receipt rule and relied upon the 90-day time frame allowed for an employee to present the actual replacement document. It is not clear whether the original receipt for the replacement alien registration card would have been sufficient if it had been the only document presented. The ALJ stated, however, "This Order holds that reverification of an individual's eligibility for employment in the United States is not subject to employment eligibility verification requirements more severe than on initial hire." Id. at 1150.

The combination of the Third Circuit's statements, the conclusions in the Martinez case, and OCAHO's historical practice of extending protections granted to newly hired employees to those who are subject to the reverification process, are more persuasive than INS' statements and DuPont's argument that the receipt rule did not extend to the reverification process in 1993.

With DuPont's acknowledgment that Dr. Getahun presented the EAD application receipt and the conclusion that the rejection of that document was improper, there is no longer any genuine issue of material fact regarding whether document abuse occurred. The refusal to honor an acceptable document is one of the three previously-discussed ways in which an employer may engage in document abuse. IBP, 7 OCAHO 949, at 454. A resolution of the second issue, whether DuPont requested a specific document, is of no moment.

Accordingly, summary decision is hereby entered in favor of Dr. Getahun. Both parties shall submit concurrent briefs within 60 days of the issuance of this Order addressing the appropriate penalty to be assessed against DuPont as well as the relief to which Dr. Getahun is entitled.

Joseph E. McGuire
Administrative Law Judge